



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 11 July 2013¹

Joined Cases C-199/12 to C-201/12

X, Y and Z

v

Minister voor Immigratie, Integratie en Asiel

(Directive 2004/83/EC — Conditions to be met by third country nationals or stateless persons claiming refugee status — Meaning of persecution — Sexual orientation)

1. These requests for a preliminary ruling from the Raad van State (Netherlands) concern three applicants who are third country nationals seeking refugee status. Each of them claims that he has a well-founded fear of persecution based on his sexual orientation.

2. The national court raises three questions concerning the assessment of applications for refugee status under the provisions of Chapter III of Council Directive 2004/83/EC ('the Directive').² First, do third country nationals who are homosexual form a particular social group within the meaning of Article 10(1)(d) of the Directive? Second, how should national authorities assess what constitutes an act of persecution concerning homosexual activities for the purposes of Article 9 of the Directive? Third, does the criminalisation of those activities in the applicant's country of origin with the possibility of imprisonment where a conviction is obtained amount to persecution within the meaning of the Directive?

Legal context

The Convention relating to the Status of Refugees

3. The first subparagraph of Article 1(A)(2) of the Convention relating to the Status of Refugees ('the Geneva Convention')³ provides that the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it'.

¹ — Original language: English.

² — Of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

³ — Signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954. It was supplemented and amended by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967. I refer to the two instruments together as 'the Geneva Convention'.

European Union law

The Charter of Fundamental Rights

4. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter')⁴ provides: '[e]veryone has the right to respect for his or her private and family life, home and communications'. Article 21 of the Charter prohibits discrimination on grounds of, inter alia, sexual orientation. Article 52(3) of the Charter states that those rights should be interpreted consistently with corresponding rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms ('the ECHR').⁵

The Directive

5. The Directive is one of several measures aimed at achieving a Common European Asylum System.⁶ That system is based on implementing the Geneva Convention which provides the cornerstone of the international legal regime for the protection of refugees.⁷ The Directive seeks to establish minimum standards and common criteria for all Member States for the recognition of refugees and the content of refugee status,⁸ for the identification of persons genuinely in need of international protection,⁹ and for a fair and efficient asylum procedure. In so doing the Directive respects the rights, freedoms and principles recognised by the Charter.¹⁰ Recital 21 in the preamble to the Directive states: 'It is equally necessary to introduce a common concept of the persecution ground "membership of a particular social group".'

6. Article 2(c) of the Directive provides: "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply'.

7. Member States may introduce more favourable rules for determining who qualifies as a refugee provided such rules are compatible with the Directive.¹¹ Article 4 sets out the rules governing the assessment of applications for international protection.¹² Article 4(3) of the Directive states that the assessment of an application for international protection is to be carried out on an individual basis. An illustrative list of 'actors of persecution' including the State and non-State actors is contained in Article 6.

4 — OJ 2010 C 83, p. 389.

5 — Corresponding rights are set out in Articles 8 and 14 ECHR respectively. Article 8 protects the right to respect for a person's private and family life. Article 14 guarantees that the rights and freedoms set out in the ECHR are to be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

6 — See recitals 1 and 2 in the preamble to and Article 1 of the Directive.

7 — See recital 3 in the preamble to the Directive. See also recital 15 which states that consultations with the UNHCR may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

8 — See recital 4 in the preamble to the Directive.

9 — See recitals 6, 16 and 17 in the preamble to the Directive.

10 — See recital 10 in the preamble to the Directive.

11 — See Article 3 of the Directive.

12 — There are currently three cases pending before the Court, Joined Cases C-148/13 to C-150/13, *A, B and C*, concerning the interpretation of Article 4 of the Directive and the common criteria for assessing the credibility of an applicant's declared sexual orientation.

8. Article 9(1) of the Directive states:

‘Acts of persecution within the meaning of Article 1(A) of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) [ECHR]; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).’¹³

9. Article 9(2) provides:

‘Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

...

- (c) prosecution or punishment, which is disproportionate or discriminatory;

...’

10. Article 9(3) states: ‘In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.’

11. Article 10 is entitled ‘Reasons for persecution’. Article 10(1)(d) states:

‘a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article’.

National law

12. The Vreemdelingenwet 2000 (Law on Foreign Nationals) (‘the Vw 2000’) empowers the relevant Minister (‘the Minister’)¹⁴ to accept, to refuse or not to consider an application for a residence permit for a fixed period (refugee status). A residence permit for a fixed period may be granted to a foreign national who is a refugee under the terms of the Geneva Convention.

13 — The inderfeasible rights under Article 15(2) ECHR are the right to life (Article 2), the prohibitions against torture and slavery and forced labour (respectively Articles 3 and 4) and an individual’s right not to be punished without prior due legal process (Article 7).

14 — At the time the applications were made the relevant Minister was the ‘Minister voor Immigratie en Asiel’. His title has since changed to ‘Minister voor Immigratie, Integratie en Asiel’.

13. The Vreemdelingencirculaire 2000 (Guidelines on the Implementation of the Law on Foreign Nationals ('the Guidelines')) contains the policy rules laid down by the Minister to implement the Vw 2000. The Guidelines state that it is established policy and settled case-law that persecution on account of membership of a social group as referred to in Article 1(A) of the Geneva Convention is also understood to mean persecution on account of sexual orientation. Claims for refugee status based on such a ground are assessed with particular regard to the position of an applicant in his country of origin. Where being homosexual or expressing sexual orientation is subject to criminal sanctions in an applicant's country of origin the penalty applicable must be of a certain level of severity. A single fine would generally be insufficient to lead to the conclusion that refugee status should automatically be granted. It does not follow from the fact that homosexuality or homosexual acts are criminalised in an applicant's country of origin that refugee status should automatically be granted. The applicant must make a plausible case that he personally has a well-founded fear of persecution. Homosexual applicants are not expected to conceal their sexual orientation on their return to their country of origin.

Facts, procedure and the questions referred

14. The applicants in the main proceedings have been anonymised and are referred to as X, Y and Z. X is a national of Sierra Leone, Y is Ugandan and Z is Senegalese.

15. Homosexual acts are criminal offences in Sierra Leone under Section 61 of the Offences against the Person Act of 1861, and are subject to a minimum term of imprisonment of 10 years up to a maximum of life. In Uganda under Section 145 of the Penal Code Act 1950 a person found guilty of an offence described as 'carnal knowledge against the order of nature' is subject to a term of imprisonment. The maximum penalty is life. The Senegalese authorities criminalise homosexual acts. Under Article 319(3) of the Code Pénal (Penal Code) a person convicted of committing certain homosexual acts is to be sentenced to a term of imprisonment of between one and five years and a fine of between XOF¹⁵ 100 000 and XOF 1 500 000 (approximately EUR 150 to EUR 2000).

16. In all three cases the Minister refused the initial applications for a residence permit (refugee status) under the Vw 2000. Each applicant then lodged an appeal against those decisions. X and Z appealed to the Rechtbank. Y made an application for interim measures. X and Y succeeded in their respective applications. Z's appeal to the Rechtbank was refused.

17. The Minister then lodged appeals in the cases of X and Y with the Raad van State. Z has also appealed to that court.

18. In all three cases the homosexual orientation of the applicant is not disputed.¹⁶

19. Accordingly, the Raad van State refers the following questions to the Court for a preliminary ruling:

1. Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) of [the Directive]?

¹⁵ — West African CFA franc (BCEAO).

¹⁶ — The United Nations High Commissioner for Refugees ('the UNHCR') included lesbian, gay, bisexual, transgender and intersex individuals within the scope of its observations; and used the acronym 'LGBTI' to convey a broad meaning of the expression 'sexual orientation'. However, since the main proceedings concern three male homosexual applicants for refugee status, I have retained that description in this Opinion.

2. If the answer to the first question is yes: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following sub-questions:
 - (a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution?
 - (b) If the answer to question 2(a) is no, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?
 - (c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of a homosexual orientation and in what way can it be determined?
3. Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in [the Offences against the Person Act 1861 of Sierra Leone, the Penal Code Act of Uganda and the Code Pénale of Senegal] constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?

20. Written observations have been submitted by X, Y and Z, the UNHCR, the German, Greek, French, Netherlands and United Kingdom Governments and the Commission, all of whom (apart from the United Kingdom) were represented at the hearing on 11 April 2013.

Assessment

Preliminary observations

21. There is a degree of overlap between the national court's questions. In interpreting Articles 9 and 10(1)(d) of the Directive the following principles should be borne in mind.
22. First, it is settled case-law that the Directive must be construed in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in its legal basis (Article 78(1) TFEU).¹⁷ As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the Charter.¹⁸
23. Second, the Geneva Convention provides the context and thus indicates the purpose and general scheme of the Directive, which makes frequent reference to it. Therefore, whilst the Court is being asked to provide an interpretation of Articles 9 and 10(1)(d) of the Directive, it must refer to the Geneva Convention when so doing.¹⁹

17 — See Joined Cases C-71/11 and C-99/11 *Y and Z* [2012] ECR, paragraph 48 and the case-law cited.

18 — Case C-364/11 *Abed El Kareem El Kott and Others* [2012] ECR, paragraphs 42 and 43 and the case-law cited.

19 — See point 32 of my Opinion in *Abed El Kareem El Kott and Others*, cited in footnote 18 above.

24. Third, in neither the Geneva Convention nor the ECHR is there an express reference to a right to the expression of sexual orientation. The case-law of the European Court of Human Rights concerning sexual orientation has developed in the context of consideration of infringements of Article 8 ECHR (right to private and family life) and the prohibition against discrimination in Article 14 ECHR.²⁰ Thus, it is necessary to consider the questions raised by the national court in the light of the principles developed by the European Court of Human Rights.²¹

25. Fourth, in that respect the Geneva Convention, like the ECHR, is not set in stone. It is a living instrument that should be interpreted in the light of present day conditions and in accordance with developments in international law.²² The case-law of the European Commission of Human Rights concerning the different treatment of homosexual and heterosexual relations with regard to the minimum age of consent shows that evolution of approach in interpreting the ECHR. Thus, prior to 1997 the Commission considered that setting a higher minimum age of consent for homosexual relations was consistent with the ECHR.²³ In *Sutherland v. the United Kingdom* the Commission reviewed and departed from its settled case-law by deciding that maintaining a higher minimum age of consent for homosexual acts was discriminatory and an infringement of the applicant's right to respect for his private life in the light of modern developments.²⁴

26. Finally, it seems to me that at the heart of the national court's questions is the determination of common criteria that should apply when identifying those persons genuinely in need of international protection who claim refugee status under the Directive on the grounds that they are homosexual. The issues which arise in question 2 might be described more as legal policy matters rather than questions of statutory interpretation. Accordingly, I shall deal first with questions 1 and 3, which raise more straightforward issues concerning the interpretation of the wording of the Directive, before turning to question 2.

Question 1

27. By its first question the national court asks whether applicants for refugee status who have a homosexual orientation can form a particular social group for the purposes of Article 10(1)(d) of the Directive.

28. All those who submitted observations to the Court (apart from the United Kingdom, which did not address this point) agree the answer to that question should be 'yes'.

29. I too concur with that view.

20 — *Dudgeon v. the United Kingdom*, 22 October 1981, paragraphs 60 to 62, Series A no. 45, concerning the right to private life. See *X and Others v. Austria* [GC], no. 19010/07, paragraph 95, 19 February 2013 concerning the right to family life.

21 — Certain regional instruments guarantee the right to non-discrimination, such as the African Charter on Human and People's Rights. However, as with the Geneva Convention and the ECHR, there is no express guarantee of the right to expression of sexual orientation. See 'Making Love a Crime – Criminalisation of Same-Sex Conduct in Sub-Saharan Africa', a report published by Amnesty International on 25 June 2013: www.amnesty.org/en/library/into/AFRO1/001/2013/en.

22 — See *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, paragraph 121, ECHR 2005-I, concerning the ECHR in general. See paragraphs 5 to 7 of the Guidelines on International Protection No. 9 of 23 October 2012, available at www.unhcr.org/509136ca9.html ('the UNHCR Guidelines'), in relation to the Geneva Convention.

23 — *X. v. the Federal Republic of Germany*, no. 5935/72, Commission decision of 30 September 1975, paragraph 2, and *Johnson v. the United Kingdom*, no. 10389/83, Commission decision of 17 July 1986.

24 — No. 25186/94, Commission decision of 1 July 1997, paragraphs 58 to 66.

30. In the main proceedings concerning Z the evidence placed before the national court at first instance (the Rechtbank) did not satisfy that court that in Senegal persons of a homosexual orientation were generally persecuted or discriminated against; and the Rechtbank therefore considered that the applicant was not a member of a particular social group within the meaning of Article 10(1)(d) of the Directive.²⁵

31. Article 10 comprises two paragraphs. The first paragraph instructs the Member States to take certain elements into account when assessing the *reasons for persecution*. Article 10(1)(d) defines, in this context, the concept of what constitutes a particular social group. The second paragraph then deals with how to assess whether a particular applicant has a *well-founded fear of being persecuted*. It follows that an applicant does not need to demonstrate that he is subject to persecution or discrimination in his country of origin²⁶ (elements that form part of Article 10(2)) in order to show that he is part of a particular social group (i.e., that he falls within the scope of Article 10(1)(d)).

32. Can male homosexuals constitute ‘members of a particular social group’ within the meaning of Article 10(1)(d) of the Directive?

33. Unlike the Geneva Convention, which refers merely to ‘membership of a particular social group’, the term ‘sexual orientation’ is used in the Directive but is not defined. It may be that the EU legislator made express reference to membership of a social group on the grounds of sexual orientation in Article 10(1)(d) of the Directive because at the time that the Commission submitted its proposal it was becoming recognised that individuals may be obliged to flee persecution and seek international protection on that basis,²⁷ even though such a ground was not expressly included in the Geneva Convention.²⁸

34. Article 10(1)(d) begins, ‘a group shall be considered to form a particular social group where in particular ...’; and those words are immediately followed by two indents (the first containing three options separated by the word ‘or’). The indents are linked by the word ‘and’, indicating that they contain cumulative conditions that must be satisfied. However, the text then continues (expressly) to state, ‘depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation ...’.

35. Looking at that text and fitting it against the two indents that immediately precede it, it seems to me that the EU legislator has given the clearest possible indication that persons with a shared characteristic of sexual orientation may indeed be members of a particular social group for the purposes of Article 10(1)(d). They satisfy the first indent (I would say, in any event because they fall within the third option: that they ‘share a characteristic ... that is so fundamental to identity ... that a person should not be forced to renounce it’). Depending on the circumstances in the country of origin, they may also satisfy the second indent (that ‘that group has a distinct identity in the relevant country, because it is perceived as being different from the surrounding society’). Whether or not they do satisfy the second indent entails an assessment of the legal rules and the social and cultural mores in the applicant’s country of origin. That is a matter which the competent national authorities must determine on the facts, subject to review by the national court.

25 — That assessment of the Rechtbank is mentioned in the Raad van State’s request for a preliminary ruling. However, the referring court has not indicated whether it is of the same view as the Rechtbank. My understanding is that the Raad van State has referred to the Rechtbank’s assessment in order to explain its own reasons for seeking guidance on the interpretation of Article 10(1)(d) of the Directive. I have therefore taken the Rechtbank’s assessment into account in my analysis.

26 — The Rechtbank may have been misled by the fact that the second indent of Article 10(1)(d) refers to a group having a distinct identity because it is ‘perceived as being different by the surrounding society’. However, being ‘perceived as different’ is, of itself, a neutral state of affairs. Being persecuted or discriminated against clearly is not.

27 — See COM(2001) 510 final, in particular part 3.

28 — The UNHCR Guidelines now refer to the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted in 2007. In paragraph 4 of the preamble to the Yogyakarta Principles, ‘sexual orientation’ refers to ‘a person’s capacity for profound emotional, affection and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender’.

36. Accordingly I consider that the first question should be answered to the effect that applicants for refugee status who have a homosexual orientation may, depending on the circumstances in their country of origin, form a particular social group within the meaning of Article 10(1)(d) of Directive 2004/83. It will be for the national court to assess whether such a group has a ‘distinct identity’, in the case of each applicant’s country of origin, ‘because it is perceived as being different by the surrounding society’, for the purposes of the second indent of that provision.

Question 3

37. By its third question the national court asks whether the criminalisation of homosexual acts and the possibility of imprisonment where a conviction is obtained constitute an act of persecution within Article 9 of the Directive.

38. Certain findings have been made in the national proceedings concerning all three applicants. As regards X, homosexuality per se is not criminalised in Sierra Leone; but certain homosexual acts are subject to criminal sanctions. As regards Y, homosexuality of itself is criminalised in Uganda.²⁹ As regards Z, homosexuality as such does not appear to be criminalised in Senegal, but certain homosexual acts are subject to criminal sanctions.³⁰

39. Given that it is not disputed that the three applicants are homosexual, I have not drawn a distinction in this Opinion between the situation in Uganda (where there is a finding that homosexuality is criminalised per se) and Sierra Leone or Senegal (where certain homosexual acts are subject to criminal sanctions).³¹

40. X, Y and Z submit that Article 9 of the Directive should be interpreted as meaning that the criminalisation of homosexual activities of itself is an act of persecution. There is a degree of common ground in favour of the contrary view between the Commission, the governments of the Member States that made observations and the UNHCR.

41. Within the European Union, there has been a shift in approach in as much as legislation which criminalises and imposes sanctions for homosexual acts in private between consenting adults is now considered to be contrary to the ECHR.³² It is plain therefore that across the Member States such measures would today constitute an infringement of an individual’s fundamental rights, whether they were actively applied or not. However, the goal of the Directive is not to grant protection whenever an individual cannot fully and effectively exercise the freedoms guaranteed by the Charter or the ECHR in his country of origin. To put the same point another way: the aim is not to export those standards.³³ Rather, it is to restrict the recognition of refugee status to those individuals who may be exposed to a serious denial or systemic infringement of their most fundamental rights, and whose life has become intolerable in their country of origin.

29 — In X’s and Y’s cases those findings at first instance (made respectively by the Rechtbank and the judge who heard the application for interim measures) are mentioned in the Raad van State’s requests for a preliminary ruling. However, the referring court has not indicated whether it is of the same view as the courts at first instance. My understanding is that the Raad van State has referred to those findings in order to explain its own reasons for seeking guidance on the interpretation of Article 9(1) of the Directive; and I have therefore taken them into account in my assessment.

30 — See point 15 above.

31 — I understand that the Netherlands authorities adopt a similar position in the Guidelines: see point 13 above.

32 — Apart from *Dudgeon*, cited in footnote 20 above, the well-known cases are *Norris v. Ireland*, 26 October 1988, Series A no. 142, and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259. The national legislation at issue in *Modinos* was repealed relatively recently (in 1997). See also the case-law of the European Commission of Human Rights concerning discrimination and the age of consent for homosexual and heterosexual acts mentioned in point 25 and footnotes 23 and 24 above.

33 — *F. v. the United Kingdom*, no. 17341/03, paragraph 3, and *I.L.N. v. the Netherlands*, no. 2035/04. Such an export might indeed be regarded as a form of human rights or cultural imperialism.

42. Does what would be an infringement of a fundamental right within the EU necessarily constitute an act of persecution within the meaning of Article 9(1) of the Directive?

43. Article 9(1) states that '[a]cts of persecution within the meaning of Article 1(A) of the Geneva Convention must (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or (b) be an accumulation of various measures, including violations of human rights[,] which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)'. It follows from the references there to 'sufficiently serious', 'severe violation' and 'accumulation ... which is sufficiently severe' that not every violation of human rights (repugnant though it indeed may be) will fall to be considered as an 'act of persecution' for the purposes of Article 9. Indeed, the illustrative list of acts of persecution contained in Article 9(2) expressly cross-refers to the standard laid down by Article 9(1), inasmuch as it states that 'acts of persecution *as qualified in paragraph 1*'³⁴ can inter alia include those then set out in points (a) to (f). Article 9(3) goes on to make it clear that there must be a connection between the reasons for persecution (Article 10) and the acts of persecution as defined in Article 9(1).

44. A conceptual difficulty arises inasmuch as, where the Charter protects a fundamental freedom, *any* prosecution or punishment of a person for exercising it would, *within the EU*, be 'disproportionate' by definition. I therefore take the reference in Article 9(2)(c) – the entry in the non-exhaustive list of acts of persecution that appears most relevant to the present proceedings – to 'prosecution or punishment which is disproportionate or discriminatory' to equate to 'prosecution or punishment which is severe or discriminatory'.

45. It seems to me that, in determining whether – on that basis – acts prohibiting the expression of sexual orientation are such as to constitute 'acts of persecution' within the meaning of Article 9(1), the national authorities should take into account, in particular, (i) evidence concerning the application of criminal provisions in the applicant's country of origin, such as whether the authorities actually bring charges and prosecute individuals; (ii) whether criminal sanctions are enforced and, if so, how severe those sanctions are in practice and (iii) information concerning the practices and the mores of society in general in the country of origin.³⁵

46. The test to apply in assessing an application for refugee status is, does any one event or a cumulation thereof indicate that that applicant has a well-founded fear that his basic human rights are likely to be denied if he were to return to his country of origin?³⁶

47. Criminal sanctions that result in a long period of imprisonment for expressing a homosexual orientation could amount to an infringement of Article 3 ECHR (the prohibition against inhuman and degrading treatment or punishment), and thus would be sufficiently serious to constitute a severe violation of basic human rights for the purposes of Article 9(1) of the Directive.

48. Considered in that light it is plain to me (even in the absence of detailed information concerning the characteristics of offences relating to the applicants in the main proceedings and the specific penalties usually imposed for those offences) that in a general sense the penalties imposed in Sierra Leone, Uganda and Senegal may potentially amount to punishment which is 'disproportionate' within the meaning of Article 9(2)(c) of the Directive. It is true that the statutory penalties for committing

34 — Emphasis added.

35 — Thus, for example, if expression of sexual intimacy in public between heterosexual adults is discouraged and punished by the criminal law, mere application of the same rules to homosexual adults would not amount to an act of persecution. The position would be different, however, if the law were never enforced against heterosexuals but actively enforced against homosexuals. See further point 75 below.

36 — See *Y and Z* cited in footnote 17 above, paragraphs 53 and 54.

certain homosexual acts in Senegal are not as draconian as those in Sierra Leone or Uganda. Before reaching the conclusion that, for that reason, the threshold for an act of persecution under Article 9(1) of the Directive is not satisfied, the national court should have regard to the risk of one-off or repeated prosecution and the sentence imposed if a prosecution is successful.

49. In general terms, it is thus for the national authorities, having ascertained whether a particular applicant is, by reason of his homosexual orientation, to be considered as a member of a particular social group within the meaning of Article 10(1)(d), to go on to examine whether the circumstances in his country of origin are such as to give rise to acts of persecution within the meaning of Article 9(1). To do so, they should assess whether repressive measures are applicable to those who are, or who are thought to be, members of that social group;³⁷ whether those measures are enforced and the severity of the sanctions imposed; and whether – in consequence – the applicant has a well-founded fear of persecution. The national authorities' determination of these matters must, of course, be subject to review by the national courts in order to guarantee the correct application of the criteria laid down by the Directive.

50. Accordingly, I consider that the third question referred should be answered to the effect that the criminalisation of an activity does not per se constitute an act of persecution for the purposes of Article 9(1) of the Directive. Rather, it is for the competent national authorities to assess, in the light of the circumstances pertaining in the applicant's country of origin, in particular, to (i) the risk and frequency of prosecution, (ii) in the event of successful prosecution, the severity of the sanction normally imposed, and (iii) any other measures and social practices to which the applicant may reasonably fear to be subjected, whether a particular applicant is likely to be subject either to acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, or to an accumulation of various measures, including violations of human rights, which is sufficiently severe similarly to affect the applicant.

Question 2

51. By question 2 the national court seeks guidance as to whether, if a homosexual applicant is to be regarded as belonging to a particular social group for the purposes of Article 10(1)(d) of the Directive, there are certain homosexual activities which fall within the scope of the Directive and which mean that refugee status should be granted.

52. The national court then asks a series of sub-questions³⁸ concerning the common criteria that might apply in determining who qualifies as a refugee. It asks, first, to what extent is public or private expression of homosexual orientation protected by Article 10(1)(d) of the Directive? Second, should an applicant be expected to conceal his sexual orientation in order to avoid persecution in his country of origin? Third, can he be expected to exercise restraint when expressing his homosexual orientation, and, if so, to what extent? Fourth, what should then be understood to constitute the core area of a sexual orientation? Finally, does EU law in general or the Directive in particular preclude drawing a distinction as to the protection to which foreign nationals are entitled, depending on whether their sexual orientation is homosexual or heterosexual?

53. Before I address those sub-questions, a number of preliminary remarks are needed.

54. First, the national court here essentially seeks guidance as to how to conduct the detailed assessment required under Articles 9 and 10 of the Directive. Article 10(1)(d) sets an express boundary to what may constitute a social group based on a common characteristic of sexual orientation, inasmuch as it states clearly that 'sexual orientation cannot be considered to include acts

³⁷ — See Articles 9(3) and 10(2).

³⁸ — I have rearranged these sub-questions in order to separate out the various issues raised by the national court.

considered to be criminal in accordance with national law of the Member States'. Thus, for example, a sexual orientation that involved the applicant in carrying out compulsory genital mutilation on his female sexual partner in order to make her 'worthy' of sexual relations with him would not qualify for protection under Article 10(1)(d). Article 9 contains a definition (Article 9(1)(a) and (b)) followed by a non-exhaustive list (Article 9(2)) and a requirement that there must be a connection between the reasons and the acts of persecution (Article 9(3)), but is open-ended as to what may constitute an act of persecution.

55. Second, it is unclear precisely how the sub-questions posed relate to issues raised in the main proceedings. Rather, the national court seems to be requesting advice on how the Directive might be applied in general. That is beyond the remit of the Court in the preliminary reference procedure.³⁹

56. Third, at a more pragmatic level, the national court explains that the Netherlands' authorities consider that homosexual activities merit the same protection as heterosexual activities. However, I do not consider that the applicant's activities should be the focal point of the assessment. Articles 9 and 10 are essentially not concerned with the conduct of the person seeking refugee status. Rather, they are concerned with possible acts of persecution and with the reasons therefor, that is with the active conduct of possible actors of persecution, rather than with the everyday behaviour of the possible victim.

57. Fourth, in carrying out such an assessment it is of course necessary to take into account any restrictions that applied to the applicant before he left his country of origin. However, it is equally relevant to examine the available evidence to evaluate whether the applicant is likely to face acts of persecution if he returns. Thus, the question is whether the applicant has a well-founded fear that he will suffer a severe violation of his basic human rights. Such a question cannot be answered by looking exclusively at acts that occurred before the applicant left his country of origin.

58. Fifth, the premiss behind the national court's questions appears to be that homosexual applicants for refugee status relying on Article 10(1)(d) have a choice (and perhaps even a responsibility) to behave in their respective countries of origin in a manner that reduces the risk of acts of persecution on grounds of their sexual orientation. I would reject such a premiss, because it runs counter to their right to respect for their sexual identity.

59. It is against that background that I turn to consider the various sub-questions posed by the national court.

60. Concerning the first sub-question, is there a distinction for the purposes of the Directive between the expression of an applicant's homosexual orientation in private or public?

61. The text of the Directive draws no such distinction. It therefore seems to me that a distinction of that type is not relevant to any determination of whether there is an act of persecution within the meaning of Article 9(1) of the Directive. Rather, the pertinent questions are whether the applicant, by reason of his sexual orientation, is a member of a social group for the purposes of Article 10(1)(d) and whether there is a connection as required by Article 9(3) between that 'reason for persecution' and an act or acts of persecution under Article 9(1).

62. Next, the national court asks whether applicants for refugee status should be expected to conceal, or exercise restraint in expressing, their sexual orientation in their country of origin. It is unclear from the order for reference whether this question has a bearing on the way in which the competent national authorities handled these particular applications for asylum. It may be that the national court wishes to know whether the Guidelines, insofar as they state that concealment is not a criterion to take

³⁹ — Case 244/80 *Foglia* [1981] ECR 3045, paragraphs 18 to 20.

into account, merely reflect the norms of the Directive or whether they represent the application by a Member State of more favourable standards, as permitted by Article 3.⁴⁰ To the extent that these questions are raised in the abstract, they are not matters for the Court to answer. For the sake of good order, I shall nevertheless address them briefly.

63. I do not consider that an applicant for refugee status should be expected to conceal his sexual orientation in order to avoid persecution in his country of origin.

64. Neither the wording nor the scheme of the Directive supports such a view. Indeed, it would be perverse to interpret the Directive in that way. It would mean that if the applicant (the victim) failed to conceal his sexual orientation, he was in some way deemed to be implicated in his own plight as an actor of persecution, which is irreconcilable with the way in which Article 6 of the Directive is framed. Indeed, a requirement that applicants should conceal their sexual orientation might be regarded as constituting an act of persecution in itself.

65. Should homosexual applicants for refugee status be expected to return home and exercise restraint in their country of origin?

66. I do not think so.

67. First, it is unclear to me how, conceptually, such a condition would fit within the scheme of the Directive (or, indeed, the Geneva Convention). The Directive lays down minimum standards for the qualification of third country nationals or stateless persons as refugees (Article 1). In order to assess whether a particular applicant meets those minimum standards, the Member State examines the facts and circumstances (Article 4) in order to establish whether the applicant has been or may be subject to acts of persecution or serious harm (as defined in Article 9) for certain specific reasons of persecution (as defined in Article 10). If an applicant has a well-founded fear of being so persecuted, he is entitled to be granted refugee status. Nowhere within that scheme does one find material to support the proposition that the need to grant refugee status could be avoided if only the applicant would ‘stop provoking’ the actors of persecution by being himself.

68. Second, it is true that a person who applies for asylum on the grounds of his homosexual orientation cannot expect to be entitled to live in his country of origin in the same way as he might live in the Netherlands.⁴¹ That said, determining how much ‘restraint’ would (a) be required to keep the applicant safe back home whilst (b) still being compatible with preserving the fundamental right whose denial justifies the grant of refugee status seems to me to be a process that would inherently be subjective and that would be likely to produce arbitrary results rather than legal certainty. The national court itself states in its order for reference that the Minister is unable to determine in advance the degree of restraint which may be expected. Of itself, that statement suggests to me that such an approach would be unworkable in practice.

69. Third, to say that all will be well if the applicant behaves discreetly on his return home is to ignore reality. Discretion is not a sure protection against discovery and consequent blackmail or persecution.

70. On that basis, it is unnecessary to answer the sub-question (what constitutes the ‘core area’ of a sexual orientation). However, I add the following observations for the sake of good order.

⁴⁰ — See point 13 above.

⁴¹ — See for example *F. v. the United Kingdom*, cited in footnote 33 above.

71. I understand the term ‘core area’ to be derived from *Y and Z*, where the Court considered whether the applicants’ fundamental rights were infringed by restrictions imposed on exercising the right to religious freedom. I am not convinced that that term is transposable to the context of expression of sexual orientation. It seems to me that one either has a sexual orientation or not.⁴² There is no ‘core’ or ‘centre’ to be considered as such. Thus, I would find it difficult to accept that it is possible to identify a core area of expression of sexual orientation. Nor do I believe that that is a route the Court should pursue.

72. More generally, however, I consider that the Court’s reasoning in *Y and Z* applies here by analogy.⁴³ There is no basis for a ‘core area’ approach in the wording of Articles 9 and 10 of the Directive. Article 9 refers to the inderogable rights in the ECHR; and that should be the reference point for assessing acts of persecution. There is nothing to suggest that a distinction should be made between different types of expression or indeed instances of expression that are not sexual acts or acts of affection. By definition, an approach based on such a premiss is likely to lead to arbitrariness.

73. The final sub-question is whether EU law in general or the Directive in particular precludes drawing a distinction as to the protection to which foreign nationals are entitled, depending on whether their sexual orientation is homosexual or heterosexual.

74. How should applications for refugee status be assessed where the alleged acts of persecution apply to both homosexuals and heterosexuals?

75. Suppose that in a particular third country any public display of affection between two persons (such as holding hands or kissing) is prohibited and that, according to the law, the sanction upon conviction for such an offence can range (depending on the circumstances) from a monetary fine to a flogging. The legislative measure criminalising and punishing such conduct is drafted as applying to heterosexuals and homosexuals alike. Suppose that a person of homosexual orientation flees that country and comes to an EU Member State seeking asylum. It would not be immediately evident that such an applicant would be subject to persecution simply by virtue of his sexual orientation. However, if he were able to show that the measure was in practice only regularly enforced, or only attracted the severest sanctions, where homosexuals were involved (and that, in practice, heterosexuals were generally able to walk down the street holding hands or to kiss in public with impunity, or that they invariably received only very minor fines), he would be more likely to be able to establish that he formed part of a particular social group for the purposes of Article 10(1)(d) of the Directive. It would then be necessary to examine whether the prosecutions and the sanctions typically imposed on a homosexual upon conviction amounted to an act of persecution within the meaning of Article 9(1) of the Directive (in my example and on my assessment, the answer would be yes).

76. Drawing together the threads of my answers to the various sub-questions put by the national court, I consider that the second question referred should be answered to the effect that, in assessing whether criminalisation of the expression of homosexuality as an expression of sexual orientation is an act of persecution within the meaning of Article 9(1) of the Directive, the competent authorities of a Member State must consider whether the applicant is likely to be subject to acts, or an accumulation of various measures, that are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights.

42 — Celibacy, as the deliberate non-expression (physically) of one’s sexual orientation, may be voluntarily chosen for a number of reasons; but it cannot be imposed without denying the very existence of sexual personality.

43 — See points 38 to 52 and 62 to 68 of Advocate General Bot’s Opinion in *Y and Z*, cited in footnote 17 above.

Conclusion

77. I am therefore of the opinion that the Court should answer the questions referred by the Raad van State to the following effect:

- (1) Applicants for refugee status who have a homosexual orientation may, depending on the circumstances in their country of origin, form a particular social group within the meaning of Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. It will be for the national court to assess whether such a group has a ‘distinct identity’, in the case of each applicant’s country of origin, ‘because it is perceived as being different by the surrounding society’, for the purposes of the second indent of that provision.
- (2) The criminalisation of homosexual acts does not per se constitute an act of persecution for the purposes of Article 9(1) of the Directive. It is for the competent national authorities to assess, in the light of the circumstances pertaining in an applicant’s country of origin in relation, in particular, to:
 - the risk and frequency of prosecution;
 - in the event of successful prosecution, the severity of the sanction normally imposed; and
 - any other measures and social practices to which the applicant may reasonably fear to be subjected,

whether a particular applicant is likely to be subject either to acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, or to an accumulation of various measures, including violations of human rights, which is sufficiently severe similarly to affect the applicant.

- (3) In assessing whether criminalisation of the expression of homosexuality as an expression of sexual orientation is an act of persecution within the meaning of Article 9(1) of the Directive, the competent authorities of a Member State must consider whether the applicant is likely to be subject to acts, or an accumulation of various measures, that are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights.